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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY PAUL REYES II,

Defendant and Appellant.

C078063

(Super. Ct. No. CRF 14-1707)

A jury convicted defendant Tommy Paul Reyes II of transportation of methamphetamine for sale through noncontiguous counties (Health & Saf. Code, § 11379, subd. (b)—count 1),<sup>1</sup> possession of methamphetamine for sale (§ 11378—count 2), and conspiracy to commit a violation of section 11379, subdivision (b) (Pen. Code,

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<sup>1</sup> Undesignated statutory references are to the Health and Safety Code.

§ 182, subd. (a)(1)—count 3).<sup>2</sup> In bifurcated proceedings, the trial court sustained allegations of four prior drug convictions (Health & Saf. Code, § 11370.2) and five prior prison terms (Pen. Code, § 667.5, subd. (b)).

Sentenced to an aggregate term of 23 years in state prison, defendant appeals. He contends: (1) the trial court erroneously denied his motion to suppress; (2) the trial court prejudicially erred in failing to instruct on unanimity for the overt act for conspiracy (count 3); (3) the trial court erred in staying, rather than striking, his prior drug convictions in connection with count 2; and (4) he is entitled to one additional day of custody credit. We agree that defendant is entitled to one additional day of custody credit and that the abstract requires modification to reflect that the prior drug convictions were part of the aggregate sentence rather than attached to any one count. We reject defendant's remaining contentions and will otherwise affirm.

### **FACTUAL BACKGROUND<sup>3</sup>**

At 8:45 p.m. on April 12, 2014, a deputy sheriff on patrol in Dunnigan pulled into a gas station and noticed a white Chevrolet Tahoe with expired registration tags parked next to a gas pump. As the deputy drove around the front of the Tahoe, he conducted a registration check. Figueroa, the front seat passenger, got out of the vehicle and started to pump gas. The deputy parked behind the Tahoe, got out, and contacted Figueroa. The deputy then contacted the driver's side back seat passenger—defendant—who claimed to have recently purchased the vehicle and was trying to get it registered. As the deputy spoke with defendant, he noticed a strong odor of marijuana coming from inside the

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<sup>2</sup> Codefendant Jose Manuel Figueroa was convicted of the same offenses and has separately appealed. (See case No. C078108.)

<sup>3</sup> The facts are taken from the evidence adduced at trial. The facts adduced at the hearing on defendant's suppression motion will be recounted in our discussion of defendant's contention challenging the trial court's ruling on the motion (pt. 1.0, *post*).

vehicle. The deputy asked defendant to step out of the vehicle and as defendant did so, a glass methamphetamine pipe with residue fell from his lap and broke when it hit the ground. The deputy handcuffed both defendant and Figueroa and searched them. On Figueroa, the deputy found ten \$100 bills and a baggie containing 11.87 grams of methamphetamine. The deputy found nothing on defendant's person.

A search of the vehicle revealed loose marijuana and four cell phones around the center console. Behind a panel in the tailgate or trunk area behind the driver's side passenger seat where defendant had been sitting, the deputy found a gallon-size bag containing smaller baggies with a total of 849 grams of methamphetamine. Eight of the smaller bags contained about 56 grams each, or about two ounces, another bag contained almost eight grams, and the last bag contained 391 grams. During the search of the vehicle, Victoria Garibaldi approached and was identified as the driver. Her purse was inside the vehicle. Later, for a couple of minutes, the deputy examined the contents of the cell phones and determined that the users of two of them, defendant and Figueroa, had been communicating with each other.

An officer trained in cell phone extraction testified that he extracted information from defendant's cell phone and Figueroa's cell phone found in the vehicle. Cell phone extraction reports were introduced into evidence. These reports revealed that Figueroa, whose phone number had a 619 area code, and defendant, whose phone number had a 510 area code, exchanged numerous messages with each other as well as with "Sandman," whose phone number had a 408 area code (Santa Clara and Santa Cruz Counties). In one message to defendant, Figueroa said he was in Long Beach and asked for a ride, stating that he would "make it worth your while." Defendant responded that he would leave soon. Figueroa told defendant that he was "stuck" with his " 'baggage' " and thanked defendant. When defendant sent Figueroa a message asking him where he was, Figueroa responded it would be better if defendant wired some money rather than

coming “all the way down here” and “send some greyhound cash,” and that Figueroa would “make it up” to defendant. Defendant’s cell phone showed messages from Figueroa who listed addresses in National City (San Diego County). Figueroa’s cell phone showed that on April 11 and 12, he conducted searches for Oakland, Redding, and Gilroy. On April 11, he conducted searches for Anderson and a particular street in Los Angeles, and distance searches between Redding and Anderson and between Gilroy and Anderson. On April 10, 2014, Sandman sent a text message to Figueroa asking, “If you come tomorrow and see me will you be leaving anything with me?” Figueroa responded, “Of course.” At 11:32 p.m. on April 12, 2014, after defendant and Figueroa had been arrested, Sandman sent a text message to defendant asking, “Where are u 2?”

An expert in the area of possession for sale opined that the 849 grams, almost two pounds, of methamphetamine was possessed for sale. He opined that the methamphetamine found on Figueroa could be possessed for sale and/or personal use and could have been payment for transporting the 849 grams. The cash (\$1,000) found on Figueroa supported the opinion that the methamphetamine on Figueroa was possessed for sale but could also have been partial payment for transport. The expert also noted that Figueroa sent a text message asking for Greyhound money and three days later had \$1,000 in cash. The expert believed a text message (“in pocket”) to defendant suggested he was holding contraband or methamphetamine and in another (\$1,400) suggested an attempt to purchase the drug from defendant. The expert believed Figueroa’s text message using the word “baggage” referred to drugs. A text message from Sandman to Figueroa on March 22 asked about “any product,” which the expert opined meant methamphetamine.

## DISCUSSION

### 1.0 Motion to Suppress

Defendant contends the trial court erroneously denied his suppression motion, arguing there was no probable cause to search the vehicle. Assuming there was probable cause, defendant argues the search exceeded constitutional bounds because it was not limited in scope and lasted longer than necessary. Defendant further argues the cell phone search was unlawful. We conclude the trial court properly denied defendant's suppression motion.

#### 1.1 Background

Defendant filed a motion to suppress all evidence seized as a result of the warrantless search including police observations, defendant's statements during and after the detention and search, and the search of his cell phone and its contents.<sup>4</sup> Defendant argued that he was searched without a warrant.<sup>5</sup> He argued his detention was unlawfully prolonged. He also argued his cell phone was searched without a warrant and could not be justified by consent as any consent was a product of an unlawful detention. He claimed the officer did not have reasonable suspicion necessary to justify a warrantless investigative detention of him or his cell phone. He argued that all evidence seized following his unlawful detention must be suppressed as “ ‘fruit of the poisonous tree.’ ”

Figueroa also filed a motion to suppress all evidence seized including police observations, his statements during and after the detention, search, and arrest, as well as “[a]ll evidence seized as a result of the search of [his] cell phone.”<sup>6</sup> He argued: The

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<sup>4</sup> Defendant's attorney filed a written motion with a statement of facts taken from another case, referring to a different defendant, officers, and date.

<sup>5</sup> Defendant's attorney argued that the “warrantless detention of the defendant led to an illegal search of *his backpack*,” referring to facts in another case. (Italics added.)

<sup>6</sup> Defendant did not join Figueroa's motion.

search without a warrant was presumptively illegal; the deputy lacked reasonable suspicion to detain him; and the deputy lacked grounds to arrest him without a warrant, or to search his person, cell phone, or the vehicle. He argued all evidence flowing from the unlawful detention, search and arrest, was tainted by the illegality and “ ‘fruit of the poisonous tree.’ ”

In written opposition, the prosecutor argued the initial contact was a consensual encounter, not a detention; even if a detention, it was justified by the expired registration on the vehicle; the detention was reasonably prolonged based on defendant’s inability to produce proof of ownership of the vehicle, the methamphetamine pipe that fell from defendant’s lap when he got out of the vehicle, and the odor of marijuana; the search of the vehicle was justified by the odor of marijuana from the vehicle; the warrantless search of the vehicle, defendant, and Figueroa was authorized by the automobile exception supported by probable cause, that is, the odor of marijuana and the methamphetamine pipe; and even assuming the search of Figueroa was improper when it was conducted, the methamphetamine in his pocket would have been inevitably discovered after the deputy found the two pounds of methamphetamine in the vehicle and discovered Figueroa was on postrelease community supervision.

At the hearing on the motions of defendant and Figueroa, Figueroa’s counsel stated that he was seeking to suppress the 11 grams of methamphetamine found in Figueroa’s pocket and the evidence derived from the search of his cell phone. The prosecutor represented to the court and Figueroa’s counsel acknowledged that a search warrant was obtained for the cell phone and that Figueroa’s counsel had not moved to quash the search warrant. Figueroa’s counsel stated that the cell phone was searched prior to obtaining a warrant and the evidence obtained led to the search warrant and was thus “fruit of the poisonous tree.” The court did not discuss the issue. Instead, the court

directed the parties to proceed with the hearing and stated, “We’ll see where this ends up.”

Yolo County Deputy Sheriff Jose Vera was the only witness at the suppression hearing. At 8:45 p.m. on April 12, 2014, while in uniform and on patrol alone in a marked vehicle in Dunnigan, the deputy pulled his car into the gas station and noticed a white Chevrolet Tahoe with expired registration tags. Several other vehicles were at the pumps. The deputy drove past the Tahoe and saw a man in the front passenger seat, later identified as Figueroa, and another person in the back seat, later identified as defendant. Figueroa got out, walked around the vehicle, and started to pump gas into the vehicle. The deputy parked his patrol car about 20 feet behind the vehicle, immediately approached Figueroa, and asked who owned the Tahoe. Figueroa said it belonged to his friend, defendant. Through the open driver’s side door of the two-door Tahoe, the deputy asked the back seat passenger, defendant, about the Tahoe. Defendant claimed the Tahoe belonged to him, he had recently purchased it, and he was in the process of obtaining the registration. He was unable to produce any paperwork verifying his ownership of the Tahoe. While the deputy spoke with defendant, the deputy noticed a strong odor of marijuana inside the Tahoe. While looking for paperwork and when asked by the deputy, defendant admitted he was on probation out of Alameda County. The deputy asked defendant to get out of the Tahoe and as defendant did so, a glass methamphetamine pipe fell out of his lap and broke when it hit the ground. Sometime after seeing the methamphetamine pipe and defendant’s admitting he was on probation, dispatch informed the deputy that defendant was on searchable probation for a drug conviction in Alameda County.<sup>7</sup> The deputy put defendant and Figueroa next to each other, near the

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<sup>7</sup> When asked whether dispatch had stated whether Figueroa was on searchable probation, parole, mandatory supervision, or postrelease community supervision, the deputy answered affirmatively. When the prosecutor asked the deputy to explain, Figueroa’s counsel objected on the grounds of foundation and hearsay and the trial court

hood of a vehicle, and searched them both. The deputy did not find any contraband on defendant. The deputy found 11.87 grams of methamphetamine in Figueroa's jacket pocket. Thereafter, the deputy handcuffed them, and put them both in his patrol car. The deputy estimated that he detained and searched defendant and Figueroa less than five minutes after making contact with them. The deputy then searched the Tahoe and found seven grams of marijuana in the center console next to where Figueroa had been seated. The deputy continued to search inside the Tahoe and found a gallon-size plastic bag containing about 860 grams of methamphetamine in a compartment behind the driver's side rear passenger seat near where defendant had been sitting. The deputy stated that he discovered the methamphetamine in the Tahoe about 20 minutes after detaining defendant and Figueroa. About 30 to 45 minutes after detaining defendant and Figueroa, the deputy found four cell phones in the console area. There were no identifying markings on the outside of the cell phones to indicate ownership.

After finding the contraband, the deputy looked at the contents of the cell phones and noticed text messages had been exchanged between "Tommy" (defendant) and "Jose" (Figueroa) on two of the phones. The deputy admitted that he did not have a search warrant when he looked at the contents of Figueroa's cell phone. On Figueroa's phone, the deputy found text messages with defendant that the deputy believed were drug related.

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sustained the objection but ruled the answer would be admissible for a nonhearsay purpose—the deputy's state of mind—but the prosecutor did not thereafter ask the deputy again to explain. On cross-examination, however, the deputy testified that Figueroa had denied being on probation but that Figueroa was actually on probation. Figueroa's counsel again objected based on hearsay and lack of foundation. The trial court overruled the objection and found that the information came in for a nonhearsay purpose.

The deputy stated that a woman associated with the Tahoe had been arrested and that she too was on searchable probation. Sometime thereafter, the deputy's supervisor, Sergeant Yenne, arrived on scene.

The prosecutor claimed defendant's status of being on searchable probation and the odor of marijuana emanating from the Tahoe justified the vehicle search. Citing defendant's status as a probationer, the driver's status as a probationer, and the discovery of methamphetamine in the Tahoe, the prosecutor argued the search of the cell phones was justified. The prosecutor argued the deputy could rely on the law prior to *Riley v. California* (2014) 573 U.S. \_\_\_\_ [189 L.Ed.2d 430] (*Riley*) to search the digital information on a cell phone without a warrant, citing *Davis v. United States* (2011) 564 U.S. 229 [180 L.Ed.2d 285] (*Davis*).<sup>8</sup> The prosecutor argued that the detention and limited search of Figueroa was justified by the odor of marijuana and defendant's methamphetamine pipe, which fell to the ground. The prosecutor also argued that the methamphetamine found on Figueroa would have inevitably been discovered after the discovery of the 860 grams in the Tahoe and the text messages. The prosecutor claimed Figueroa's arrest and search was justified as a search incident to arrest based on the marijuana in the center console next to Figueroa's seat. The prosecutor also cited Figueroa's probation status.

Figueroa's counsel argued that Figueroa was unlawfully arrested immediately after defendant was handcuffed. He argued Figueroa's cell phone was thereafter searched by the deputy without a search warrant. Figueroa's counsel noted that discovery showed that a search warrant for the cell phone was obtained by law enforcement in May 2014.

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<sup>8</sup> *Riley* was decided on June 25, 2014, after the search here.

The prosecutor objected to Figueroa's argument "outside the four corners of this motion," noting that Figueroa's counsel "was on notice that there was a search warrant well before he filed a motion." The court noted that there was not any evidence of a search warrant and the prosecutor stated that he did not present evidence of a search warrant because "it was not noticed in the motion." The court responded, "Fair enough." Figueroa's counsel claimed that he stated in his written motion that he was challenging "all evidence seized as a result of the defendant's [cell] phone." The prosecutor argued that Figueroa's counsel had failed to file a motion to quash. The court commented, "Since there is no evidence of a search warrant, there is no reason to discuss it." Figueroa's counsel argued that since the cell phone search was unlawful under *Riley*, the search of the cell phone and the search of Figueroa's person must be suppressed.

The court asked Figueroa's counsel to respond to the prosecutor's argument that the chain of events would have led to Figueroa's arrest. Figueroa's counsel claimed that had Figueroa not been unlawfully arrested and searched, he would have been free to leave with his cell phone and the methamphetamine in his pocket would not have been found. The prosecutor added that Figueroa was detained when the deputy put defendant in handcuffs for officer safety reasons.

Defendant's attorney concurred "with a lot" of Figueroa's attorney's arguments without specifying which ones. She claimed that the compartment in the vehicle where the methamphetamine was found was a manufacturer's compartment, not a secret compartment. She argued that there was no evidence that there had been a period of coordination between defendant and Figueroa. Citing Figueroa's attorney's argument in his written motion that the cell phone search had been without a warrant, defendant's attorney claimed *Riley* should apply and that exigent circumstances did not apply.

In denying both motions, the trial court stated:

“I would like to address two questions initially that will be relevant to all the issues raised here.

“The first is the question of whether or not the information received by Officer Vera on the cell phones should be excluded. I have reviewed [*Davis*], which is a 2011 case found at [564 U.S. 229, 180 L.Ed.2d 285]. That court case does stand for the proposition that when an officer reasonably relies on the state of existing appellate precedence, the exclusionary rule should [*sic*] apply.

“Based upon the Court’s research I find that before the Supreme Court decision in *Riley*, no warrant was required, and therefore based upon that, the information in the cell phones was properly obtained by Officer Vera.

“The next question that I would like to address is whether or not the search by Officer Vera of Mr. Figueroa was justified. In my view, Mr. Figueroa was arrested at that time. At the time that Officer Vera conducted the search, in my view, he did not have probable cause for the arrest and for—neither for the search.

“Next we deal with the question of inevitable discovery. Had Officer Vera not arrested Mr. Figueroa, his investigation would almost certainly have continued. He would have searched the car, having searched the car, he would have found the marijuana in the console next to where Mr. Figueroa and the driver were sitting. He also would have found the methamphetamine, the 800 or so grams in the rear of the car, and as I previously mentioned, he would have found the cell phones, and he was justified in searching the cell phones.

“Given all of that, the Court finds that the inevitable discovery doctrine does apply. Counsel argue[s] that he could have simply walked away, and that is true. In order to find that the application of the inevitable discovery doctrine is appropriate, there

does not need to be true inevitability. Instead there only needs to be a reasonably strong probability that the evidence would have been gathered in a lawful manner.

“I find there is such a reasonably strong probability. Officer Vera would have continued his search and within a few minutes later would have gathered the evidence necessary to, at that point, arrest Mr. Figueroa, conduct a search incident to arrest at the time.

“So I am denying *both* motions based upon the inevitable discovery doctrine.”  
(Italics added.)

## 1.2 *Analysis*

“ ‘Our review of issues related to the suppression of evidence seized by the police is governed by federal constitutional standards.’ [Citations.] ‘In reviewing a trial court’s ruling on a motion to suppress evidence, we defer to that court’s factual findings, express or implied, if they are supported by substantial evidence. [Citation.] We exercise our independent judgment in determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment.’ [Citation.] [¶] . . . ‘The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” ’ ” (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1223 (*Robey*); *People v. Lenart* (2004) 32 Cal.4th 1107, 1119.)

### 1.2.1 *Warrantless search of the Chevy Tahoe*

“[A] warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime in the light of an exigency arising out of the likely disappearance of the vehicle, [does] not contravene the Warrant Clause of the Fourth Amendment.” (*California v. Acevedo* (1991) 500 U.S. 565, 569 [114 L.Ed.2d

619, 627] (*Acevedo*), citing *Carroll v. United States* (1925) 267 U.S. 132, 158-159 [69 L.Ed. 543]; *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059.) The automobile exception “applies only to searches of vehicles that are supported by probable cause.” (*United States v. Ross* (1982) 456 U.S. 798, 809 [72 L.Ed.2d 572] (*Ross*).) “In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.” (*Ibid.*) “In other words, the police may search without a warrant if their search is supported by probable cause.” (*Acevedo, supra*, 500 U.S. at p. 579.) “The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause.” (*Ross, supra*, 456 U.S. at p. 823.) Where there is probable cause, the search extends to closed containers. “The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.” (*Acevedo*, at p. 580.)

Here, the trial court did not rely on the automobile exception or find probable cause to search the vehicle or rely on defendant’s probation search condition; instead, it relied upon inevitable discovery. “Although it is not improper for a reviewing court to decide the merits of an alternate ground for affirming the judgment of a trial court even if that ground was not argued by the parties below [citation], [the California Supreme Court has] cautioned that appellate courts should not consider a Fourth Amendment theory for the first time on appeal when ‘the People’s new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence . . . ’ or when ‘the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition.’ ” (*Robey, supra*, 56 Cal.4th at p. 1242.)

In his written points and authorities, the prosecutor argued that the automobile exception to the warrant requirement applied. Defendant did not discuss the automobile exception or probable cause in either his written motion or at the hearing. Instead,

defendant argued that the officer did not have reasonable suspicion to justify his detention, his unlawful detention led to the search, the search was without a warrant, and the contraband should be suppressed as “fruit of the poisonous tree.” At the hearing, the prosecutor presented evidence of the expired registration of the Tahoe, the odor of marijuana, defendant’s searchable probation status, and the methamphetamine pipe that fell from defendant’s lap when he got out of the Tahoe. The prosecutor argued that defendant’s status of being on searchable probation and the odor of marijuana from the Tahoe authorized the vehicle search. Defendant concurred “with a lot” of Figueroa’s attorney’s arguments but did not specify which ones. She argued that the compartment in the Tahoe where the methamphetamine was found was a manufacturer’s compartment, that there was no evidence of coordination between defendant and Figueroa, and that *Riley* should apply.

We will conclude that the trial court properly denied defendant’s suppression motion but for the wrong legal reasoning. The prosecutor argued that the automobile exception applied and presented evidence of the same. We conclude that this exception applies here and justified the search of the Tahoe.

On appeal, defendant recognizes the automobile exception to the warrant requirement but argues the expired registration, the odor of marijuana, defendant’s searchable probation status, and the broken methamphetamine pipe, did not provide probable cause. Although recognizing the smell of marijuana coming from a vehicle may support probable cause to search a car for contraband, he states that he is raising the issue to preserve it for further review.

“If there is probable cause to believe a vehicle contains evidence of criminal activity, [*Ross, supra*,] 456 U.S. [at pages] 820 [to] 821 authorizes a search of any area of the vehicle in which the evidence might be found.” (*Arizona v. Gant* (2009) 556 U.S. 332, 347 [173 L.Ed.2d 485].) The automobile exception applies where a car is being

used as a car because it was readily mobile and there is a reduced expectation of privacy. (*People v. Hochstraser* (2009) 178 Cal.App.4th 883, 903-904.) “Under the automobile exception to the warrant requirement,” the police have probable cause to search if they believe “ ‘an automobile contains contraband or evidence’ ” of a crime (*People v. Waxler* (2014) 224 Cal.App.4th 712, 718 (*Waxler*)) and may search “ ‘ ‘ ‘every part of the vehicle and its contents that may conceal the object of the search.’ ” ’ ” (*Id.* at p. 719.) We apply the totality of the circumstances test to determine whether there was probable cause for the warrantless search. (*Illinois v. Gates* (1983) 462 U.S. 213, 230-231, 238 [76 L.Ed.2d 527].)

Here, after seeing that the Tahoe had registration tags that were expired, the officer approached Figueroa who was outside the Tahoe pumping gas. Figueroa said defendant was the owner of the car. Defendant was unable to provide paperwork establishing his ownership of the Tahoe. It would have been reasonable for the officer to believe that defendant had violated the registration requirement or that the Tahoe was possibly stolen. (Veh. Code, §§ 2805, 4000, 4454; *People v. Webster* (1991) 54 Cal.3d 411, 430; see *In re Arturo D.* (2002) 27 Cal.4th 60, 68-70.)

When the officer spoke with defendant through an open door, the officer detected an odor of marijuana. The odor of marijuana provided sufficient probable cause to search the Tahoe for the source of the odor. (*People v. Strasburg, supra*, 148 Cal.App.4th at p. 1059; *People v. Dey* (2000) 84 Cal.App.4th 1318, 1320-1322.) “Under current State of California law, nonmedical marijuana—even in amounts within the statutory limit set forth in section 11357, subdivision (b)—is ‘contraband’ and may provide probable cause to search a vehicle under the automobile exception.” (*Waxler, supra*, 224 Cal.App.4th at p. 715.)

Defendant complains that the deputy did not testify whether the odor of marijuana was burnt or fresh marijuana. A distinctive odor can provide probable cause

“to conduct a search or seizure under the automobile or exigent circumstances exception to the warrant requirement.” (*Robey, supra*, 56 Cal.4th at p. 1240 [and cases cited therein]; *Waxler, supra*, 224 Cal.App.4th at p. 719 [“the odor of unburned marijuana or the observation of fresh marijuana may furnish probable cause to search a vehicle under the automobile exception to the warrant requirement”]; see *United States v. Neumann* (1999) 183 F.3d 753, 756 [detection of smell of burnt marijuana while conducting search for open container gave officer probable cause to search entire car for drugs].) Since the determination of probable cause relies on more than just the mere odor of marijuana, it makes no difference whether the odor of marijuana was burnt or fresh.

When asked, defendant admitted that he was on probation. The deputy had defendant step out of the Tahoe. As defendant did so, a glass methamphetamine pipe fell from his lap to the ground and broke. It would have been reasonable for the deputy to believe that defendant had been smoking methamphetamine while in the Tahoe. The officer then learned from dispatch that defendant was on searchable probation for a “drug” conviction out of Alameda County. The deputy then conducted a patdown search. Although a patdown of defendant revealed nothing, a patdown of Figueroa revealed 11 grams of methamphetamine in his pocket.

In considering all of the circumstances, rather than each one in isolation, the officer had probable cause to believe the Tahoe was possibly stolen (expired registration tags and defendant’s failure to produce registration documents although he claimed ownership), contained contraband (based on the odor of marijuana emanating from the Tahoe, the broken methamphetamine pipe that fell from defendant’s lap when he got out of the Tahoe, and defendant’s prior drug conviction for which he was on searchable probation), and was being used to transport contraband. The methamphetamine found on Figueroa was not a necessary circumstance to establish probable cause to search the

Tahoe. The automobile exception, which was supported by probable cause, authorized the deputy's search of the Tahoe.

Defendant complains that the record does not reflect the “scope of the probation search condition, and thus the fact that [he] was on probation did not provide probable cause to search the vehicle.” Defendant's status of being on searchable probation for a “drug” conviction was an additional circumstance in the probable cause determination.<sup>9</sup>

Assuming that there was probable cause to search the Tahoe, defendant claims the scope of the search exceeded the constitutional bounds. He recognizes, however, that the probable possession of marijuana in a car brings the search under the automobile exception to the warrant requirement and that the scope of the search includes every part of the car and its contents. He claims that the search of the closed compartment in the cargo area where the methamphetamine was found exceeded constitutional bounds because the search was not limited in scope and lasted longer than necessary.

“ ‘ ‘ ‘ [I]f probable cause justifies the search of a . . . vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. ’ ” ” ” (Waxler, *supra*, 224 Cal.App.4th at p. 719.) The timing and search of the rear compartment was justified by the automobile exception. (Acevedo, *supra*, 500 U.S. at pp. 569-570; Ross, *supra*, 456 U.S. at p. 821.)

When the deputy began his search of the Tahoe, he discovered some loose marijuana in the center console. The discovery of the marijuana and defendant's possession of a methamphetamine pipe provided probable cause to search the rest of the Tahoe. (*People v. Dey*, *supra*, 84 Cal.App.4th at p. 1320.) About 20 minutes after

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<sup>9</sup> The parties argue whether defendant's status of being on searchable probation was established and, if so, provided an independent ground to search the Tahoe. Having found the automobile exception applies, we need not discuss this alternative ground.

detaining defendant and Figueroa, the deputy discovered the methamphetamine in the closed compartment behind the rear passenger seat where defendant had been sitting and which was accessible to him. The search of the entire Tahoe was authorized by the automobile exception supported by probable cause.<sup>10</sup>

### 1.2.2 *Warrantless search of the cell phones*

Relying upon *Riley*, defendant contends the warrantless search of the cell phones was unreasonable. He argues the warrantless search occurred during an extended search of the Tahoe so the good faith exception to the exclusionary rule does not apply.<sup>11</sup> Defendant claims the warrantless search was also unlawful as incident to an arrest.

Although noticing the cell phones immediately when he started to search the Tahoe, the deputy retrieved the cell phones in or near the center console area about 45 minutes after searching the Tahoe and finding all the contraband. There were no identifying markings on the outside of the cell phones to indicate ownership. The deputy looked at the contents of the cell phones and noticed text messages had been exchanged between “Tommy” (defendant) and “Jose” (Figueroa) on two of the phones. On Figueroa’s phone, the deputy found text messages between Figueroa and defendant that the deputy believed were drug related.

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<sup>10</sup> Defendant notes the closed compartment was secured by a screw. Although the deputy testified at trial that the compartment had a loose screw that he removed and found the methamphetamine, there was no evidence before the court ruling on his suppression motion that the compartment was secured by a screw. In any event, the automobile exception even authorizes ripping up of upholstery if there is probable cause to believe contraband or evidence is hidden within. (*Ross, supra*, 456 U.S. at p. 821.)

<sup>11</sup> As defendant and the People note, whether the good faith exception to the exclusionary rule applies to cell phone evidence obtained without a warrant before *Riley* is pending before the California Supreme Court in *People v. Macabeo* (2014) 229 Cal.App.4th 486, review granted November 25, 2014, S221852.

*Riley* held that “a warrant is generally required before [searching the data stored on a cell phone], even when a cell phone is seized incident to arrest.” (*Riley, supra*, 573 U.S. at p. \_\_\_\_ [189 L.Ed.2d at p. 451].) *Riley* declined to extend the rule of *United States v. Robinson* (1973) 414 U.S. 218 [38 L.Ed.2d 427] (*Robinson*) to a search of data on a cell phone. (*Riley, supra*, 573 U.S. at p. \_\_\_\_ [189 L.Ed.2d at p. 442].)

In *Robinson*, the defendant was arrested for driving on a revoked license. The officer conducted a patdown and found a crumpled cigarette package containing capsules of heroin. (*Robinson, supra*, 414 U.S. at pp. 220-223.) *Robinson* held that “[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.” (*Id.* at p. 235.)

Noting that information on a cell phone is not immune to search, *Riley* stated that “even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone.” (*Riley, supra*, 573 U.S. at p. \_\_\_\_ [189 L.Ed.2d at p. 451].) *Riley* listed one of these exceptions, exigent circumstances. (*Ibid.*) But exigent circumstances is not the only other exception that may apply to a search of a cell phone’s data.

Prior to *Riley*, case law permitted the examination of the cell phones under the automobile exception. “ ‘A number of courts have analogized cell phones to closed containers and concluded that a search of their contents is, therefore, valid under the automobile exception . . . .’ ” (*People v. Diaz* (2011) 51 Cal.4th 84, 100, fn. 15, overruled on other grounds in *Riley*, quoting *State v. Boyd* (2010) 295 Conn. 707 [992 A.2d 1071, 1089, fn. 17].) Drug traffickers use cell phones. (*Diaz*, at p. 97, fn. 12.) Since probable cause existed to believe that evidence of drug transactions would be found in the data storage of the cell phones, the automobile exception allowed the search of the cell phones just as it allowed the search of other closed containers found in the Tahoe.

Here, we conclude the automobile exception applied and no additional showing of an emergency was required. Assuming *Riley* can be interpreted to apply even when a cell phone is seized pursuant to the automobile exception, the good faith exception applies—the deputy was entitled to rely on the state of the law prior to *Riley*. (*Davis, supra*, 564 U.S. at p. 249.)

The cell phone extraction evidence introduced at trial was the product of a search warrant. The prosecutor represented and Figueroa’s attorney confirmed that a search warrant had been obtained to extract the information from the cell phones. At the suppression hearing, Figueroa’s attorney stated, and to the extent defendant’s attorney concurred “with a lot” of Figueroa’s attorney’s arguments, that he was challenging the deputy’s observations of the content of the phones and that the deputy’s observations led to the warrant. “[T]he reviewing court must excise all tainted information but then must uphold the warrant if the remaining information establishes probable cause.” (*People v. Weiss* (1999) 20 Cal.4th 1073, 1081.) The trial court had no occasion to review the information in the search warrant affidavit. After finding all the contraband, the deputy had additional probable cause to search the cell phones. Since pre-*Riley* law allowed the deputy’s observations of the content of defendant’s cell phone, defendant cannot show that the warrant was tainted by the deputy’s observations.

## **2.0 Unanimity Instruction**

Defendant contends the trial court prejudicially erred in failing to instruct on unanimity for the overt act for conspiracy (count 3). Defendant acknowledges that *People v. Russo* (2001) 25 Cal.4th 1124 rejected this argument. *Russo* concluded that a jury need not unanimously agree on a specific overt act as long as they unanimously find beyond a reasonable doubt that one overt act was committed. (*Id.* at pp. 1128, 1136.) *Russo* explained that jurors need only unanimously agree that a particular crime was committed, not on how it was committed. (*Id.* at pp. 1132-1133.) *Russo* is binding on

this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant requests that this court urge the California Supreme Court to reconsider its holding in *Russo*. We decline defendant's invitation.<sup>12</sup> The trial court was not required to instruct on unanimity for the overt act for conspiracy.

### **3.0 Prior Drug Conviction Enhancements**

Citing *People v. Edwards* (2011) 195 Cal.App.4th 1051, 1057-1059, defendant contends the trial court erred in staying, rather than striking, the prior drug conviction enhancements attached to count 2 when the same status enhancements had already been imposed in connection with count 1. The People concede that the prior drug conviction enhancements apply once and not to particular counts. The People request that the sentence be restructured so the prior drug convictions are part of the aggregate term rather than attached to the particular count. Defendant agrees as do we.

“[S]ection 11370.2 enhancements are status enhancements, which can be imposed only once, as part of the aggregate sentence. However, because of the structure of section 11370.2, we conclude that the Legislature intended that multiple enhancements can be imposed for the same prior convictions, if there are current multiple counts of conviction as to which different subdivisions of section 11370.2 apply.” (*People v. Edwards, supra*, 195 Cal.App.4th at p. 1057.)

Here, the amended information charged defendant in count 1 with violating section 11379, subdivision (b) and alleged four prior drug convictions within the meaning of section 11370.2, subdivision (c). In count 2, charging defendant with violating section 11378, the same four prior drug convictions were alleged within the meaning of section

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<sup>12</sup> The parties thereafter discussed the facts of the case, claiming a possible disagreement over the overt act committed could cast doubt over whether there was a unanimous finding by the jury. Defendant has not raised an issue of insufficient evidence to support the conspiracy count and we will not address this part of the argument.

11370.2, subdivision (c). Thus, the four status enhancements can be imposed but once, as part of the aggregate sentence, and we will order the judgment modified to reflect this.

#### **4.0 Custody Credit**

Defendant contends, the People concede, and we agree that defendant is entitled to one additional day of custody credit. The trial court awarded 250 actual days and 250 conduct days for a total of 500 days of presentence custody credit. (Pen. Code, § 4019.) Defendant was arrested on April 12, 2014, and was sentenced on December 18, 2014, spending the entire time in custody, 251 days rather than 250 days. We will order the judgment modified accordingly.

#### **DISPOSITION**

The judgment is modified to provide for one additional day of actual custody for 251 actual days and a total of 501 days of presentence custody credit. The judgment is also modified to reflect that the four prior drug convictions are to be listed only in item 3 on form CR-290, deleting the four enhancements associated with count 2 in item 2. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy of the amended abstract to the appropriate parties. As modified, the judgment is affirmed.

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BUTZ, Acting P. J.

We concur:

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MAURO, J.

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HOCH, J.